OGC 82-01854
25 February 1982

STAT MEMORANDUM FOR: [redacted]
Office of Inspector General

STAT FROM: [redacted]
Assistant General Counsel

SUBJECT: Whether the Prior Disclosure of Information Declassifies the Information

1. The following summary is for your information and
STAT assistance in addressing [redacted] appeal. In considering whether the decisions of the PRB should be upheld, you should review the procedural as well as substantive criteria for classification. You also should consider the extent information in
STAT [redacted] manuscript has previously been released. If your investigation leads you to conclude [redacted]s manuscript STAT discloses classifiable information obtained during the course of his employment and not already in the public domain, authority exists to uphold the PRB's decision. On the other hand,
STAT [redacted] has a First Amendment right to publish unclassified information.

2. First Amendment Requirements. While [redacted] STAT contractual obligations enable CIA to conduct a security review of his manuscript, that review is limited. Set forth below is relevant and illuminating language from the major court decisions addressing the Agency's prepublication review authority.

a. In the Snepp case, the Supreme Court seems to agree that a CIA employee has a First Amendment right to publish unclassified information. Snepp v. United States, 100 S. Ct. 763, 765 (1980). Because it did not have the issue before it, the court does not explicitly state the extent of CIA's ability to delete information. The resulting ambiguity in the majority opinion, however, is addressed in Justice Stevens' dissent:

> ... the Government's censorship authority would surely have been limited to the excision of classified material. Id. at 771.

* * *

> I do not understand the Court to imply that the Government could obtain an injunction against the publication of classified information. Id. at 771, fn. 11.

b. In the Marchetti decision, the court stated the First Amendment limits the extent the United States may subject its employees to a system of prior censorship:

> It precludes such restraints with respect to information which is unclassified or officially disclosed ...
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> * * *
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> Information, though classified, may have been publicly disclosed. If it has been, Marchetti should have as much right as anyone else to publish it. United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972).

c. Finally, another case noted that:

> classified information ... was not in the public domain unless there has been official disclosure of it. Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975).

I believe these cases hold that, while all appropriate material must be submitted for prepublication review, only information that would harm U.S. security interests (i.e., is classified or classifiable) may be excised. The issue before you is whether information in [redacted] manuscript was approved for release by CIA on previous occasions and, if so, whether it was declassified by such public releases through official channels, albeit reluctantly. Classification can be maintained or restored, if at all, only upon a finding that acknowledgment of the information at this time reasonably could be expected to damage the national security. That damage must be identifiable.

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3. Substantive Requirements. Courts have indicated that both substantive and procedural criteria for classification must

be met in order to withhold information from the public. Executive Order 12065 establishes two prerequisites for classification. First, information must concern one of seven enumerated categories of classifiable information. Section 1-301. Second, information may not be classified unless its disclosure "reasonably could be expected to cause at least identifiable damage to the national security." Section 1-302. Information may be withheld under the FOIA only if it has been properly classified. 5 U.S.C. §552b(1). Unlike the FOIA, E.O. 12065 generally may be deemed a protection, rather than disclosure, law. However, section 1-101 of the order provides that "[i]f there is reasonable doubt ... whether the information should be classified ... the information should not be classified."

4. An agency's classification decisions generally must be accorded substantial weight, Military Audit Project v. Casey, 656 F.2d 724 (1981); Hayden v. NSA, 608 F.2d 1381 (D.C. Cir. 1979); Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978); but any judicial review clearly would be designed to test the validity of CIA claims that the national security would be damaged by the disclosure of information previously authorized by the CIA itself for release to the public and thereafter disseminated. A court could well question CIA's credibility in light of the information made public and its effect on the national security. Generally, the more widespread the dissemination, the heavier the burden of showing damage will result from additional disclosure.

5. Procedural Requirements. The order provides that information may be declassified only by competent authority (section 3-1) after a determination that the information has lost its sensitivity with the passage of time (section 3-301). It has been asserted the previous PRB actions were erroneous. When an Agency official, even in the course of his official duties, inadvertently releases information that has not been subject to the official scrutiny contemplated by the order, it can be argued, at least in principle, that the release was not authorized and, therefore, the information remains classified and privileged. Whether or not a disclosure has been inadvertent, however, the court decisions have depended upon the particular facts of each case. In the case at hand, I believe it cannot be argued, in light of the provisions of HR 6-2, that the reviewers
STAT of [redacted] manuscript were not authorized to approve
STAT release when they informed [redacted] the Agency had no security objection to the manuscript presented at that time.

6. Courts have distinguished between authorized and unauthorized releases. In Murphy v. Department of the Army, 613

F.2d 1151 (D.C. Cir. 1979), the court denied a request from a Congressman under the FOIA where the information was disclosed to him in Congress but had not in fact been released to the public. The court stated that the information would lose its privileged status "only when there is an actual disclosure" and concluded a release to Congress was not such a disclosure, but a limited dissemination. Id. at 1159.

7. A ruling in Safeway Stores Incorporated v. F.T.C., 428 F. Supp. 346 (D.D.C. 1977), held that even release to the public may not always constitute a waiver of a privilege to withhold information. There, the court found that neither an authorized release to a Congressman nor an unauthorized "leak" to the press constituted a waiver of the b(5) exemption. Two more recent cases also found that an unauthorized leak did not waive the government's claim to a b(3) exemption. Murphy v. FBI, 490 F. Supp. 1138 (D.D.C. 1980); Military Audit Project v. Casey, supra. However, release of information to a nonfederal entity in another case was found to be a waiver because it was a voluntary, authorized release to the public. Education/Instruction, Inc. v. H.U.D., 471 F. Supp. 1074 (D. Mass. 1979). This distinction between a release that is authorized and one that is not cannot be ignored, particularly in light of the language of Executive Order 12065 precluding reclassification of documents released to the public.

8. Status of Previously Released Information. Executive Order 12065, section 1-607, provides:

> Classification may not be restored to documents already declassified and released to the public under this Order or prior Orders. (Emphasis added.)

Upon the issuance of the order, the White House Press Secretary issued a press release, dated June 29, 1978, that identified the order's major differences from its predecessor, Executive Order 11652. One such change was:

> (17) The new order says that classification may not be restored to documents once they are officially released to the public. (Emphasis added.)

While this language refers to documents, I believe the same principles apply to information. There is no dispute that CIA, through the PRB, informed [redacted] it had no security objection to publication of at least some of the information in

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question. Such a concession, consciously made, represents a release to the public, although it seems to me a statement refusing to confirm or deny either the truth or sensitivity of information whose release we do not contest might alter that conclusion.

9. Some courts have concluded that the prior release of classified information should not be binding on the government if, at a later time, it is determined on substantive grounds that further release of related information would jeopardize the national security. In Halkin v. Helms, 598 F.2d (D.C. Cir. 1978), reh. denied en banc (1979), the government was able to assert the state secrets privilege although similar information already had been disclosed in prior litigation. The court stated:

> Whether the disclosure there was inadvertent or intentional is irrelevant here. The government is not estopped from concluding in one case that disclosure is permissible while in another case it is not. Id. at 9.

It should be noted that the court, sitting en banc, denied a petition for rehearing despite the strong views of Judges Bazelon and Wright that the information was public, the government had shown no harm from the prior disclosures, and no damage to the national security reasonably could be expected to result in the case before them. The majority of the court, however, believed that the related, but not identical, prior disclosure was not inconsistent with later claims of privilege. Compare Phillippi v. Central Intelligence Agency, 546 F.2d 1009, 1014, fn. 11 (D.C. Cir 1976) (prior official disclosures had made a refusal to "confirm or deny" government involvement in the Glomar Explorer project no longer possible under the FOIA).

10. In Navasky v. CIA, 499 F. Supp. 269 (S.D.N.Y. 1980), documents remained classified despite prior releases of some, but not all, of the information contained therein. The court accepted CIA assertions that official disclosure could have serious foreign relations consequences. Id. at 276. In Military Audit Project v. Casey, supra, also, the release of some information to the public in prior litigation, in addition to widespread leaks and speculation pertaining to the Glomar Explorer, did not contradict the government's allegations that damage to the national security would result from the disclosure

of other, related information.* The court specifically rejected on substantive grounds the contention that leaks or even official disclosure of some information required the subsequent release of all information about the Glomar Explorer. The plaintiffs, in effect, had failed to prove that "the cat is already out of the bag." Id. Slip Op. at 40. See also Phillippi v. CIA, No. 80-1940 (D.C. Cir. June 25, 1981).

11. Similarly, Hayden v. NSA, 608 F.2d 1381 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980), dismissed the view that an agency's rationale for nondisclosure of intercept targets was inherently implausible simply because "some channels monitored by NSA are well known to be closely watched." Id. at 1388. That case involved a request that NSA identify which communications channels it monitored, and supports the argument that widespread "knowledge" alone is insufficient reason to require the release of information. However, unlike CIA here, NSA had not previously authorized release of the specific information in question.

12. While the cases indicate that nonofficial disclosures of classified information are insufficient to preclude exercise of the b(1) exemption under the FOIA, the government in those cases also was required to show that an unauthorized disclosure could reasonably be expected to damage the national security. The effects of prior disclosures, of course, will vary in each case.

> In our view the extent to which prior disclosure may constitute a waiver of the FOIA exemptions must depend both on the circumstances of prior disclosure and on the particular exemptions claimed. Carson v. United States Department of Justice, 631 F.2d 1008, 1016, fn. 30 (D.C. Cir 1980).

For the CIA to argue that identifiable damage to the national security would result from the release of information after CIA found no security objection, knowing public release would follow, may well involve the "willing suspension of disbelief" that Judge Bazelon noted in his dissent in Halkin v. Helms, supra. Nevertheless, even in rather extreme circumstances, a court has

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* That information included a Senate Committee Report and William Colby's book. The court concluded that the unauthorized release of neither constituted an official disclosure.

required consideration of the national security interest at stake in protecting the information at issue. Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977), cert. denied, 434 U.S. 1046 (1978). There, a background briefing to the press authorized release of certain information, but not its attribution to the Secretary of State.

13. Outside the FOIA context, the United States has been able to restrain publication of information believed to pose a danger to the national security, even though that information had previously been released. United States v. Progressive, Inc., 486 F. Supp. 5 (1979). The government's error in inadvertently declassifying the documents did not place them into the public domain. As soon as the declassification error was discovered, the documents, which had received only limited dissemination, were removed from the public shelves at Los Alamos. Moreover, the court found an absence of other, related information in the public domain. Accordingly, the court found that publication of the material would likely result in "direct, immediate and irreparable injury to this country," and enjoined publication that would have violated the Atomic Energy Act.

14. Conclusion. The cases I have found indicate that an inadvertent or nonofficial disclosure does not place information in the public domain. CIA can excise information that is classified, or classifiable, and not in the public domain. While an argument can be made that previously released information can be reclassified upon showing the requisite damage to the national security, it is not clear whether Executive Order 12065 supports that argument. In any event, the burden of showing such damage likely will be heavy and depend upon the extent the information has been disseminated.

15. To assert that CIA can excise information it already has approved for release would involve technical arguments that I believe run counter to the spirit of existing law, and invite a court's close scrutiny to evaluate any alleged damage to the national security from additional release. See Founding Church of Scientology of Washington, D.C., Inc. v. NSA, 610 F.2d 824 (D.C. Cir. 1980) (protection of information already well publicized would frustrate policies of the FOIA); Lamont v. Department of Justice, 475 F. Supp. 761 (S.D.N.Y. 1979). That the courts on equitable grounds might not look favorably upon the Agency's attempt to retract its earlier decisions is evidenced by language in Snepp, supra:

> If the agent secures prepublication clearance, he can publish with no fear of liability. Id. at 768.

STAT [redacted] may have had a legitimate expectation in this case he could publish information that appears to have been approved for release after considerable negotiation. [redacted] manuscript STAT may also involve some of the same information that appeared in a book written by Victor Marchetti, and which was highlighted in boldface print to indicate that CIA previously had a security objection which it withdrew. Moreover, [redacted] appears to STAT have signed a secrecy agreement identical to that litigated in the Marchetti case, supra. Accordingly, the same principles seem to apply.

16. Finally, it should be noted that a limited argument exists that would permit the Agency to continue to classify information disclosed in manuscripts previously released by the PRB. I can envision an Agency decision to refuse to confirm or deny matters contained in a manuscript "approved" for release in order, for example, not to draw attention to the sensitivities involved in a particular disclosure. The information, although released, arguably could remain classified and exempt from release under the FOIA. Language to effectuate such action, which I believe should seriously be considered by the PRB for future cases, would have to be carefully drafted in order to stand legal scrutiny. However, that approach, while valid perhaps in the FOIA context, seems to raise practical and legal obstacles when dealing with First Amendment issues during prepublication review. Existing case law does not specifically address the question whether information officially placed in the public domain can be reclassified. An argument could be made that CIA can excise such information upon showing potential harm to the national security. It is not evident whether the information can meet the classification standards in this case, but Marchetti and Knopf, supra, seem to indicate that even reclassified information cannot be excised if it has been officially released. As this paper addresses only the legal issues arising from [redacted] STAT appeal, you should keep in mind there are also policy considerations involved in deciding whether risking litigation is a viable option.

[redacted] STAT

cc: Deputy Inspector General

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